United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1575

TO BE SUBMITTED

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA,

Appellee,

-against-

MELVIN SANDERS,

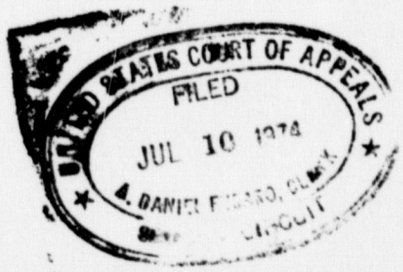
Appellant.

- - - - - - - - - - - - - - - - - - x

Docket No. 74-1575

BRIEF FOR THE APPELLEE

DAVID G. TRAGER
United States Attorney
Eastern District of New York



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HERBERT G. JOHNSON,
Assistant United States Attorneys
Of Counsel

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PRELIMINARY STATEMENT

This is an appeal from an order of the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York, dated February 5, 1974, denying without a hearing a motion by appellant, Melvin Sanders, made pursuant to 28 U.S.C. §2255 to set aside appellant's conviction upon the grounds that the Government had entrapped a co-defendant, Martha Pinkelton, and that she had been promised that she would not be prosecuted if she testified against appellant.

On May 17, 1972, at the conclusion of a jury trial before Judge Weinstein, appellant was found guilty of possessing and concealing, (Count I), transferring and delivering,(Count II), and conspiring to possess and deliver (Count III), counterfeit ten, twenty and fifty dollar Federal Reserve Notes (18 U.S.C., §§472,473 and 371). Appellant was on the same date sentenced

pursuant to 18 U.S.C., §4208(a)(2) to a term of seven and one-half years imprisonment on Counts I and II, and five years on Count III, such sentences to run concurrently.

The judgment of the District Court was affirmed in open court without opinion by this Court on November 6, 1972.

On appeal from the denial of his §2255 motion to vacate his conviction, appellant claims that Judge Weinstein erred in not holding an evidentiary hearing.

STATEMENT OF THE CASE

On May 5, 1972, appellant was charged in a three count indictment with possessing and concealing (Count I), transferring and delivering (Count II), and conspiring to possess and deliver (Count III) approximately one hundred sixty-nine thousand dollars ($169,000) in counterfeit ten, twenty and fifty dollar Federal Reserve Notes, in violation of 18 U.S.C. §§472, 473 and 371.

Named together with appellant as defendants in the indictment were Martha Pinkelton, Ronnie Robinson and Herman Fillyaw. The charges against Martha Pinkelton were severed and she testified as a witness for the Government at appellant's trial.* The charges against Ronnie Robinson were also severed, and it was anticipated that he also would testify for the Government. However, at the time of trial, while on the witness stand, he recanted his earlier statement implicating appellant. Subsequently, Robinson pleaded guilty to Count III of the indictment and was sentenced. Herman Fillyaw pleaded guilty to the indictment prior to the trial of appellant and did not testify as a witness for the Government; he was sentenced following appellant's trial.

*On November 2, 1972, on motion of the Government, the indictment against Pinkelton was dismissed "without prejudice".

On May 17, 1972, after a jury trial before the United States District Court for the Eastern District of New York (Weinstein, J.), appellant was found guilty as charged and was sentenced to a term of seven and one-half years on Counts I and II, and five years on Count III, such sentences to run concurrently.

On November 2, 1972, a post-trial hearing was held before Judge Weinstein on appellant's motion for a new trial under Rule 33 upon the ground that promises allegedly were made to induce Martha Pinkelton to testify against appellant. After the hearing, Judge Weinstein denied appellant's motion for a new trial.

Thereafter, appellant filed a motion under 28 U.S.C. §2255 to vacate sentence on the ground that the Government had entrapped Martha Pinkelton, and again upon the ground that she had been promised that she would not be prosecuted if she testified against appellant. In his order dated February 5, 1974, denying such motion without hearing, Judge Weinstein found that the trial record, as well as the hearing upon appellant's motion for a new trial, proved conclusively that, such claim was meritless, and that no point would be served by the holding of another hearing. Upon the issuance of that order, the instant appeal followed.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION TO VACATE SENTENCE WITHOUT AN EVIDENTIARY HEARING.

In his pro se brief, appellant argues that Judge Weinstein was required by law to hold an evidentiary hearing upon his motion to vacate sentence pursuant to 28 U.S.C. §2255, citing Taylor v. United States, 487 F.2d 307 (2d Cir. 1973). Taylor, however, explicitly recognized that the District Court may summarily dismiss a §2255 motion without a hearing, where "the files and records of the case conclusively show that the appellant is entitled to no relief". Sanders v. United States, 373 U.S. 1,6, 15 (1963); Dalli v. United States, 491 F.2d 758, 760 (2d Cir. 1974); Raines v. United States, 423 F.2d 526, 529 (4th Cir. 1970). Thus where, as here, there are no new issues raised and the motion is on its face frivolous, Dalli v. United States, supra; Raines v. United States, supra, the District Court may properly deny a §2255 motion without first holding an evidentiary hearing.

As Judge Weinstein noted in his order denying appellant's motion, the trial record, as well as that of the post-trial hearing upon appellant's earlier motion for a new trial, conclusively established the speciousness of appellant's claim. This is not a case, as in Taylor v. United States, supra, where the appellant presented a "sufficient" affidavit which raised new issues which would require a new trial if facutally sustained.

Rather, here, a post-trial hearing had been previously held upon the very issues which appellant sought to raise in his motion to vacate sentence under 28 U.S.C. §2255. At that hearing, counsel for appellant was afforded a full opportunity to establish appellant's contention that the Government had made promises to co-defendant Martha Pinkelton to induce her to testify against appellant; he was unable to do so. See Argument II, infra. The question of the entrapment of Miss Pinkelton was also rejected at that hearing (Hearing Transcript, pp. 24-25). Judge Weinstein therefore correctly denied the subsequent §2255 motion on the ground that another hearing on these issues "would, of necessity, be non-productive and cumulative".

28 U.S.C. §2255 specifically provides that the District Court need not entertain a "second or successive motion for similar relief" under that section. Sanders v. United States, supra, 373 U.S. at 15-17. While it is true that technically the appellant has not presented a second motion for the same relief since the earlier motion sought a new trial pursuant to Rule 33, it is well established that issues previously litigated at trial or upon direct review (which would include a motion for a new trial) cannot be made the basis for collateral attack under 28 U.S.C. §2255. Panico v. United States, 412 F.2d 1151, 1154 (2d Cir. 1969), cert. denied, 397 U.S. 921 (1970); Matysek v. United States, 339 F.2d 389, 391 (9th Cir. 1964), cert. denied, 381 U.S. 917 (1965). Where a full evidentiary hearing was previously held upon substantially the same claim, this Court has held that it was proper for the trial judge to summarily deny

a motion under §2255 without hearing in order to avoid relitigation of issues. Dalli v. United States, supra, 491 F.2d at 762 (§2255 motion raised same issue as had been the subject of pre-trial suppression hearing). In the instant case, no useful purpose would be served by a second hearing, and the District Court therefore properly denied the appellant's motion without a hearing.

POINT II

THE TESTIMONY OF MARTHA PINKELTON WAS NOT THE RESULT OF GOVERNMENT PROMISES; NOR WAS HER POSSIBLE DEFENSE OF ENTRAPMENT AVAILABLE TO THE APPELLANT.

On November 2, 1972, the very issues which appellant now raises were the subject of a hearing held before Judge Weinstein on appellant's motion for a new trial. There, Martha Pinkelton testified that no promises had been made to her by the Government (Hearing Transcript, pp. 5, 6, 13, 14). The testimony of Assistant United States Attorney Emanuel A. Moore and Special Agent Douglas Paschal corroborated that fact (Hearing Transcript, pp. 15-22). After listening to all the evidence, Judge Weinstein denied appellant's motion for a new trial (Hearing Transcript, p. 22), stating:

> "I don't see any point, based on fact; I can find no promise was made and that the jury had before it in adequate form the statement of the relationship and what the witness might have expected from the Government, and that the matter was put fully to the jury by the charge. The jury was fully apprised of the possible effect on her veracity of this relationship. ... I don't think the evidence suggests that the testimony this morning was not true. They had Miss Pinkelton dead to right; she was caught with all these counterfeit bills and the pressure on her to testify was very great. I don't think they had to promise her anything, myself, to get her to testify. She was more than willing." (Hearing Transcript, pp. 22,23).

Moreover, during the trial itself, the relationship of

Martha Pinkelton to appellant and the question of whether promises were made to induce her trial testimony against appellant were fully explored and were subjects of cross-examination by appellant's counsel (Trial Transcript, pp. 72-74). This factual issue was resolved against the appellant by the jury.

Since no promises were made to Martha Pinkelton, appellant's reliance upon the rule enunciated by the United States Supreme Court in Giglio v. United States, 405 U.S. 150 (1972), is misplaced here.

With respect to the appellant's claim of entrapment, it need only be noted that the alleged defense of entrapment was personal to Martha Pinkelton and was not available to the appellant. Appellant does not allege that he himself was other than a willing participant, fully predisposed to commit the crime for which he was convicted. Rather he relies upon his claim that Martha Pinkelton was entrapped.

Appellant lacks the requisite standing to raise as an issue the entrapment of a co-defendant. His position is analogous to one who attempts to rely upon the constitutional rights of another in order to take advantage of the various exclusionary rules. Cf. Alderman v. United States, 394 U.S. 165, 174 (1969); Mancusi v. DeForte, 392 U.S. 364, 366-67 (1968); Simmons v. United States, 390 U.S. 377, 389-90 (1968); Jones v. United States,

362 U.S. 257, 261, 267 (1960); See also Goldstein v. United States, 316, U.S. 114, 122-23 (1942), in which the United States Supreme Court denied standing to one who sought to challenge the testimony of cooperating co-conspirators. There the damaging testimony of the co-conspirators had been induced by a pre-trial confrontation with their telephone conversations which had been intercepted by government agents in violation of §605 of the Federal Communications Act.

Whatever evidence might have been adduced that Martha Pinkelton had been entrapped into her participation in the conspiracy and substantive acts charged, there is nothing in the trial record or in the post-trial hearing which would suggest that the appellant was in any way entrapped or was other than a willing participant predisposed to commit the crime for which he was convicted. See United States v. Russell, 411 U.S. 423 (1973); United States v. Rosner, 485 F.2d 1213, 1221-22 (2d Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3474 (U.S. Jan. 1, 1974) (No. 74-1062). Whatever defense Miss Pinkelton could have advanced along those lines was not and could not have been available to appellant. As the Court stated in Russell, "entrapment is a relatively limited defense" (411 U.S., supra at 435) which may be invoked only when "the government's deception actually implants the criminal design in the mind of the defendant." Id. at 436. There is nothing in this case to suggest that the Government implanted anything in the mind of appellant.

Finally, it is well settled law that a claim of entrapment must be made at trial and cannot serve as a predicate for collateral attack under 28 U.S.C. §2255. Eaton v. United States, 458 F.2d 704, 707 (7th Cir.), cert. denied, 409 U.S. 880 (1972); Evans v. United States, 408 F.2d 369, 370 (7th Cir. 1969); Matysek v. United States, supra, 339 F.2d at 391. Accordingly, appellant's §2255 motion, insofar as it was based on entrapment, was frivolous.

Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

CAROLYN N? JOHNSON, being duly sworn, says that on the 10th day of July, 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, axx two copies of the BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Melvin Sanders
Pro Se
U.S. Penitentiary
P.O. Box 1000
Lewisburg, PA 17837

Sworn to before me this
10th day of July, 1974

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 19[illegible]

Carolyn N. Johnson

Carolyn N. Johnson

SIR:

PLEASE TAKE NOTICE that the within will be presented for **settlement and signature** to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly **entered** herein on the ____ day of _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,
Dated: Brooklyn, New York,
_____, 19____

_____
United States Attorney,
Attorney for _____

To:
_____
_____
_____
Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355

CONCLUSION

The order denying appellant's motion should be affirmed.

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

PAUL F. CORCORAN,
HERBERT G. JOHNSON,
Assistant United States Attorneys
Of Counsel